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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1984

NO. 84-541 (3)

ERIC S. SMITH, *Petitioner*

v.

KENTUCKY BAR ASSOCIATION, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR PETITIONER IN REPLY

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BRIEF FOR PETITIONER IN REPLY

Respondent avoids the issues raised in the Petition,[1] and effectively admits that if the facts are as presented in the Petition, the decision of the Kentucky Court *cannot* properly stand. Nevertheless, the misimpressions which its Opposition Brief fosters necessitate this Reply.

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1. Respondent's Brief in Opposition does *not* challenge this Court's jurisdiction to review Petitioner's case, or claim the existence of other adequate state grounds as a basis for the Kentucky Supreme Court's decision. Nor does it take issue with the fact that Petitioner's constitutional claims were timely and properly raised in the proceedings below.

ARGUMENT IN REPLY

1. THE KENTUCKY COURT'S OPINION IS NEITHER BASED UPON NOR CONSISTENT WITH THE CHARGE, TRIAL COMMISSIONER'S REPORT, OR OPINION OF THE BOARD OF GOVERNORS.

Respondent urges this Court to accept as fact that the Kentucky Court's July 5th Opinion is "based upon" and "consistent with" the original Charge against Petitioner, the trial commissioner's Report, and Board's Opinion. For example, on page 7, it is stated:

> . . . the Kentucky Court's opinion shows that it was based on factual allegations contained in the charge, and based on the report of the trial commissioner and the Board of Governors. In the modified opinion . . . the Kentucky Court expressly stated: "We adopt the decision of the Board of Governors."

Such statements erroneously imply that the Board's findings of fact and conclusions of law, and not merely the Board's decision to suspend Petitioner, were adopted by the Kentucky Court.

The Opposition Brief fails to point out that the Kentucky Court's October 12th Opinion *also* stated: "(w)e adopt the decision of the Board of Governors." Appendix at 9a. Yet, when Petitioner raised his due process challenge to that Opinion, by pointing out to the Court that it had based his suspension on a ground not complained of in the Charge,[2] counsel for Respondent did *not* defend that Opinion as being consistent with the Charge, trial commissioner's Report, or Board's Opinion. On the contrary, he urged the Court to modify its Opinion, in order to avoid Petitioner's constitutional challenges, stating:

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2. See Petition for Rehearing, Appendix at 50a, 54a.

> . . . the most appropriate, expeditious and effective way for the Court to modify its Opinion *would be to adopt the findings of fact and conclusions of law of the trial commissioner and the Board of Governors.* . . . All such objections by respondent (Petitioner herein) can be easily resolved *if the court were to modify its Opinion to follow the recommendations of the trial commissioner and the Board of Governors.* Response to Petition for Rehearing (hereinafter "Response"), Appendix at 79a-80a (emphasis added).

Despite his requests, and contrary to what he now implies, the Kentucky Court's July 5th Opinion did *not* adopt, and is not "consistent with," the Board's findings of fact and conclusions of law.[3] Although the Court modified its October 12th Opinion, it did *not* change the basis for Petitioner's suspension.

These facts clearly demonstrate that counsel for Respondent's new interpretation of the Court's July 5th Opinion is unfounded. They just as clearly reveal the inconsistency of his attempt to defend in this Court essentially the same Opinion which he unsuccessfully urged the Kentucky Court to modify.

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3. If the Kentucky Court had intended to adopt the findings of the Board, then it would have so stated, as it did in *Kentucky Bar Association* v. *Gregory*, 659 S.W. 2d 204 (Ky. 1983), an opinion *rendered on the same day as the Court's original opinion in this case.* The Court in *Gregory* stated: "(t)he Court, having considered the record and the briefs of the parties, *adopts the findings* and recommendations of the Board of Governors. . . (emphasis added). *Id. Not* finding Petitioner guilty of the misconduct alleged in the Charge or condemned in the Board's Opinion, the Court in this case did *not* adopt the Board's findings.

2. THERE WAS NO SEPARATE CHARGE OF "UNETHICAL CONDUCT."

At page 10, counsel again reverses his position, by suggesting that the Charge "also alleged that petitioner had engaged in 'unethical and unprofessional conduct . . .'." He now argues that the words "unethical and unprofessional conduct" specified a separate offense, distinct from the specific disciplinary rules which the Charge alleged Petitioner had violated. The record, however, reveals that counsel for Respondent *never* previously suggested the existence of a separate charge of "unethical conduct" at *any* stage in the proceedings below. His arguments in this Court cannot now disguise the fact that this separate charge did *not* exist, until announced by the Kentucky Court to justify an otherwise unsupportable suspension.[4]

The words "unethical and unprofessional conduct," however, refer *only* to "actions" which the Inquiry Tribunal alleged to have "violated Disciplinary Rules 1-102(A)(4), 5-101(A), 5-104(A), 5-105(A) and 6-101(A)(3),"[5] and *cannot be logically interpreted to state a separate, unrelated charge.* The Inquiry Tribunal *never* intended to

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4. See Petition for Certiorari at 6-7, n. 21 at 14. Counsel for Respondent's presentation of this case highlights the danger of aggregation of roles in Kentucky disciplinary proceedings. It is inconceivable that the Board of Governors, 16 busy attorneys (meeting once a month on all Kentucky Bar Association business), reviewed the over 650 page transcript (and extensive briefs) as its counsel suggests. A review of the briefs and Board's Opinion will reveal, that the Board relied heavily on its counsel/employee's presentation. If, as in this case, an unfair or inaccurate presentation is made by its counsel, then the natural reliance by the Board upon its counsel/employee (if combined with any deference by the Kentucky Court to the Board, its enforcement agency) may well foreclose hope of a fair and impartial hearing, especially when, as here, oral argument is denied.

5. Charge, Appendix at 44a-45a.

condemn Petitioner's "participation" in the loan transaction, in the absence of any violation of those listed rules.

Significantly, the trial commissioner who conducted the only hearing on the Tribunal's Charge made *no* mention of a separate charge of "unethical conduct" in his "Statement of Charges," nor elsewhere in his Report. Appendix at 24a-39a. His Report reveals that Petitioner's preparation of the loan check, his formation of Nath Holdings, Inc., and his opening of its bank account (all at Nath's request), were *never* alleged to be "unethical conduct," nor was the propriety of such "participation" ever questioned in that hearing.[6]

Counsel for Respondent further erroneously implies that the Board condemned Petitioner's mere "participation" in the loan transaction. The Board, however, condemned as "unethical" only actions in violation of the cited rules, stating that ". . . in sum, *this conduct* has brought the bench and bar into disrepute." Board's Opinion, Appendix at 16a (emphasis added).

The Opposition Brief is therefore at odds with the Inquiry Tribunal, trial commissioner, and Board of Governors, each of which *never* mentioned the existence of a separate "unethical conduct" charge. Consequently, counsel for Respondent's argument, at page 11, that *In re Ruffalo*, 390 U.S. 554 (1968) is inapplicable, because "peti-

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6. On page 4, counsel for Respondent misrepresents the scope of the hearing by stating: "(t)he evidence (at the hearing) completely addressed . . . all the facts and circumstances surrounding petitioner's participation in Nath loaning $30,000 to REBSCS." The evidence presented at the hearing, however, dealt *only* with whether the disciplinary rules enumerated in the Charge were violated, and did *not* address the propriety of Petitioner's "involvement" or "participation" in the loan transaction. See Report of Trial Commissioner, Appendix at 24a-26a, 38a-39a.

tioner had fair notice of the charge against him prior to the evidentiary hearing and no new charges were issued against him after he had testified," is clearly without merit. The Court's decision to suspend Petitioner, upon a ground which was *never* charged or tried, clearly violated procedural due process principles enunciated by this Court in *Ruffalo*.

3. THE COURT *DID NOT* FIND THAT PETITIONER REPRESENTED NATH IN THE LOAN TRANSACTION.

Counsel for Respondent now implies what he unsuccessfully urged the Kentucky Court to find[7]—that Petitioner represented Nath in the loan transaction. The Court, however, did *not* do so, and found only that Petitioner served as Nath's attorney in *other* matters.

This may further explain why the Court left unchanged the essence of its October 12th Opinion, and did not find violations of the specific disciplinary rules enumerated in the Charge and Board's Opinion. As pointed out in the Petition for Rehearing, "... violation of those rules requires a finding that conflicting attorney-client relationships existed *with regard to the particular transaction in question.*" Appendix at 51a-52a.

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7. Response, Appendix at 80a-82a. By repeated references to Nath as Petitioner's "client," the misimpression is fostered that Petitioner served as Nath's attorney *in the loan transaction*, a misimpression which is reinforced by counsel for Respondent's statement, at page 9, that "(t)he Kentucky Court essentially found that an attorney-client relationship existed between petitioner and Dr. Nath...."

4. THE VAGUE "UNETHICAL CONDUCT" STANDARD, *AS UNFORESEEABLY ENLARGED AND RETROACTIVELY APPLIED* IN THIS CASE, DEPRIVED PETITIONER OF FAIR NOTICE AND DUE PROCESS.

Respondent closes with an argument apparently intended to convince this Court that Kentucky's "unprofessional and unethical conduct" standard is not void by reason of its vagueness. Petitioner, however, has not challenged the constitutionality of that vague standard, only its *unforeseeable enlargement* and *retroactive application* in this case.

The real question is whether Petitioner could reasonably be deemed to have been on notice that the Kentucky Court would condemn the conduct described in its Opinions. The Opposition Brief obscures this question by stating (at pages 14, 18, and 23) that the Kentucky Court found "violation of fiduciary duties." However, the words "fiduciary duties" do *not* appear, and no "violation of fiduciary duties" was found, described, or complained of, in either of the Court's Opinions.[8] The Court, in its final Opinion, stated only that a lawyer must " . . . not place himself or herself in a position of *participating in a transaction*, such as here, so as to bring the bench and bar into disrepute." July 5th Opinion, Appendix at 6a (emphasis added).

Despite the erroneous impressions fostered by the Opposition Brief,[9] Petitioner had *no notice*, at the time of the loan transaction, that his mere "participation" could be

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8. See Annotated July 5th Opinion, Appendix at 132a-137a.

9. The Brief in Opposition contains many other factual inaccuracies. The following are some further examples:

(continued on page 8)

condemned.[10] The Opposition Brief ignores the fact that 23 practicing attorneys from across Kentucky (and a local county bar association) endorsed an amicus brief (Appendix at 90a-116a) challenging the Court's determination that Petitioner's "participation" in that loan transaction was "unethical." When coupled with the Court's own admission that this case "is one of first impression" (July 5th Opinion, Appendix at 6a), the arguments in the Brief Amicus Curiae demonstrate that Kentucky attorneys had *no prior notice* that the Kentucky Supreme Court would consider such conduct to be "unethical."

(footnote 9, continued from page 7)

1.) On page 4, counsel for Respondent erroneously states that "(t)he trial commissioner found petitioner guilty of many of the allegations of fact contained in the charge." The trial commissioner, being only authorized to find facts, drew *no* conclusions as to guilt or innocence. See Petition at 18-19.

2.) Contrary to what is implied at page 6, Petitioner was afforded *no* opportunity to be heard before the Inquiry Tribunal, or to orally argue his case before the Board or Kentucky Court.

3.) On page 10, is an extremely distorted recitation of "facts," without citation to the Kentucky Court's Opinions. Many of these "facts" have been unsuccessfully urged upon the Kentucky Court by counsel for Respondent, and are refuted in Petitioner's Reply Brief, Appendix at 117a-131a.

10. Respondent's reliance upon *Daugherty* v. *Runner*, 581 S.W. 2d 12 (Ky. App. 1978) is misplaced. *Daugherty* is neither a disciplinary case, nor a decision of the Kentucky Supreme Court. Despite Respondent's argument, at page 14, dicta from that opinion could *not* logically be considered to have established a *disciplinary* standard of which all Kentucky attorneys should be aware. Further, *In re Ray*, 390 S.W. 2d 899 (Ky. 1965), quoted on pages 15 and 16, *cannot* be read to be applicable to a situation where, as here, there was *no* representation in the loan transaction, and where Petitioner did *not* benefit at the expense of a client. Certainly the attorneys who endorsed the Brief Amicus Curiae did *not* believe these cases to be applicable to the facts of this case.

5. SECRECY IN THE PROCEEDINGS DEPRIVED PETITIONER OF DUE PROCESS OF LAW.

Respondent does not directly address Petitioner's argument that by substituting the new charge, during its final deliberations, the Kentucky Court transformed the proceedings into a "secret trial," similar to the type which this Court condemned in *In re Oliver*, 333 U.S. 257, 269 (1945).[11] Respondent apparently concedes that, if the Kentucky Court did suspend Petitioner on a ground not alleged in the Charge, the Kentucky Court's actions deprived Petitioner of procedural due process.

CONCLUSION

Respondent's arguments offer no reliable basis for a denial of certiorari. The Petition demonstrates that the Kentucky Court suspended Petitioner from the practice of law, *solely* upon an unforeseeable ground which had *never* been charged or tried. The Kentucky Court's actions violated due process principles established by this Court in *Ruffalo; In re Oliver*, 333 U.S. 257 (1948); *Cole* v. *Arkansas*, 333 U.S. 196 (1948) and, *DeJonge* v. *Oregon*, 299 U.S. 353 (1937). Further, by rejecting *Ruffalo*, the Kentucky Court's

11. Respondent only argues that the operation of SCR 3.150(1) did not restrict Petitioner from investigating his case or presenting evidence. During the proceedings, however, Petitioner was approached and informed by Nath that he (Nath) had been advised that Petitioner would probably pay him $30,000, if he filed the disciplinary complaint. His admission seriously undermined, and gave sound reason to question, the veracity of *all* of Respondent's witnesses. However, in fear of violation of SCR 3.150(1), counsel for Petitioner did *not* independently investigate this matter, and requested Respondent investigate the circumstances surrounding Nath's admitted abuse of the disciplinary process. Respondent declined to investigate, nor would it present the matter to the Kentucky Supreme Court. In fact, Respondent opposed Petitioner's motion requesting the Kentucky Court to order such an investigation.

Opinion conflicts with decisions of other state courts, which appear to uniformly recognize that the principles of *Ruffalo* extend to state disciplinary proceedings. See, e.g., *People* v. *Emeson*, 638 P.2d 293 (1981); *Walker* v. *Supreme Court of Arkansas Committee on Professional Conduct*, 628 S.W. 2d 552 (Ark. 1982). Thus, the Petition presents *two* of the three grounds for certiorari specified in Rule 17 of this Court: a conflict with decisions of this Court (Rule 17.1(c)), and a conflict with decisions of other state courts of last resort (Rule 17.1(b)).

For the reasons set forth above, and in the Petition for a Writ of Certiorari, Petitioner respectfully prays that this Court will issue a Writ of Certiorari to review the final Opinion of the Kentucky Supreme Court.

Respectfully submitted,

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